FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/145183

PRELIMINARY RECITALS

Pursuant to a petition filed November 13, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a hearing was held on January 29, 2013, at Kenosha, Wisconsin.

The issue for determination is whether Community Care, Inc. (Community Care) correctly reduced Petitioner's Land Therapy from two hours to one h our per week and whether Community Care correctly reduced the accompanying Caregiver Hours from four hours per week to two hours per week, effective November 24, 2012.

NOTE: The record was held open to give the parties an opportunity to supplement the record. On February 1, 2013, Ms. Gall submitted closing arguments and a letter from [redacted] of Sports Physical Therapy and Rehab Specialists. They have been marked collectively as Exhibit 9 and entered into the record. On February 4, 2013, Ms. Buono submitted a closing argument on behalf of Community Care. It has been marked as Exhibit 10 and entered into the record.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted] Gall
6737 W Washington St Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Christina Gabon, Program Director
Karen Buono, Program Manager
Susan Stengert, RN Care Manager
Amy Baumle, Rehab Therapy Consultant

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Kenosha County.

2. Petitioner suffered from a traumatic brain injury after being struck by a car, which left him with severe rigidity/tone and contracture of his muscles. Petitioner does not speak, uses a wheel chair and is completely dependent upon others for his activities of daily living (ADLs). (Exhibit 7)

3. Petitioner lives with his parents. His mother is his legal guardian. (Exhibit 1)

4. Petitioner has been attending physical therapy on land (land therapy) two times per week to receive Therapeutic Exercises and Neuromuscular Reeducation. (Exhibit 6) The sessions themselves are one hour long, but four hours of Caregiver hours were approved for accompanying Petitioner to his therapy sessions. (Exhibit 6)

5. Petitioner's land therapy utilizes Swiss balls, wedges and hi -low tables; sometimes two to three people are needed to transition Petitioner on and off the equipment. (Exhibit 6, pg. 18)

6. Petitioner receives informal therapy at home, in a passive range of motion (PROM) regimen administered by Petitioner's personal care workers , 15 minutes a day, seven days a week. The PROM regimen was established about eight years ago and has not been formally updated, although Petitioner's mother has made adjustments on her own, after watching Petitioner's therapy sessions. (Exhibit 6)

7. On November 9, 2012, Community Care sent Petitioner a notice of adverse action indicating that it was reducing his land therapy from two hours per week to one hour per week and that the accompanying Caregiver hours would be reduced from four hours per week to two hours per week.

   Community Care indicated that the one hour of approved therapy would consist of two, 30 minute sessions per week, to assist Petitioner in standing and with weight bearing in his lower extremities. It was determined that Petitioner's parents would not be able to do these exercises at home, due to their age and their own physical limitations.

   Community Care indicated that it wanted to replace one hour of skilled physical therapy, with a Home Exercise Plan (HEP), 30 minutes a day, seven days a week, to be administered by Petitioner's caretakers. This would be an increase of 15 minutes per day from the current PROM regimen currently administered by Petitioner' s caregivers. (Exhibit 2)

8. On November 13, 2012, Penelope Gall filed a request for fair hearing on Petitioner's behalf. (Exhibit 2)

9. The ultimate goal of Petitioner's physical therapy is to maintain his current level of flexibility and range of motion, so that he is easier to dress and bathe. (Exhibit 6, pgs. 11-15; Exhibit 7, pgs. 33-54)

10. Petitioner's tone and spasticity increases, which leads to decreased flexibility and range of motion, when Petitioner is unable to attend physical therapy due to illness or traveling with his parents. When Petitioner's flexibility decreases, it is more difficult for his caretakers to dress and bathe him. (Id.; testimony of Amy Baumle)

DISCUSSION

The Family Care Program (Family Care) is a subprogram of Wisconsin's Medical Assistance (MA) program and is intended to allow families to arrange for long-term community-based health care and support services for older or impaired family members without resort to institutionalization. *Wis. Stats. §46.286; Wis. Admin. Code §DHS 10.11; Medicaid Eligibility Handbook (MEH), §29.1.*

An individual, who meets the functional and financial requirements for Family Care, participates in Family Care by enrolling with a Care Management Organization (CMO), which, in turn, works with the participant and his/her family to develop an individualized plan of care. *See Wis. Stats. §46.286(1) and Wis. Admin. Code §DHS 10.41.* The CMO, in this case Community Care, implements the plan by contracting with one or more service providers.

Wis. Admin. Code DHS 10.41(2) states that:

> Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n (c) and ss. 46.275, 46.277 and 46.278, Stats., the long-term support community options program under s. 46.27, Stats., and specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.
>
> *Emphasis added*

Wis. Admin Code DHS 10.44(2)(f) states that the CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee that meets all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)(2) and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes. …

One of Petitioner's desired outcomes is to, "maintain as much flexibility in his arms and legs as possible…" (Exhibit 6, pg. 11)

The current appeal is based upon Petitioner's complaint that Community Care unreasonably reduced his hours of skilled physical therapy and the accompanying Caregiver hours. It is Community Care's position that a more cost-effective means of meeting Petitioner's goals is to transition Petitioner from skilled physical therapy to a more comprehensive home exercise plan. It is also Community Care's position that skilled physical therapy is no longer medically necessary to meet Petitioner's desired outcomes.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hansen*, 295 N.W.2d 209, 98 Wis.2d 80 (Wis. App. 1980) The court in Hanson stated that the policy behind this principle is to assign the burden of proof to the party seeking

to change a present state of affairs. Thus, the burden of proof falls upon Community Care to prove that it had a reasonable basis upon which to reduce Petitioner's hours of skilled physical therapy and the accompanying Caregiver hours.

Ms. Baumle testified that Community Care wanted to change the manner in which Petitioner receives therapy for a number of reasons. First, Petitioner's Interdisciplinary Team (IDT) felt that Petitioner would benefit from more daily PROM exercises in an HEP, because he becomes noticeably less flexible when he misses physical therapy due to illness or traveling. Second, the IDT felt that because Petitioner has not made significant progress in recent years and is in a maintenance phase of his therapy, it would be more cost-effective to transition Petitioner from skilled physical therapy to an HEP, because Medicare will not pay for maintenance therapy.

First, with regard to cost-effectiveness, it appeared that Community Care looked at the issue in terms of what would be more cost-effective for their agency, not necessarily what would be most cost-effective overall to the taxpayers who fund both Medicare and Family Care. Second, when asked to compare the current cost of skilled therapy with the cost of implementing a more comprehensive HEP, Community Care was unable to provide a clear estimate of the change in total cost. This was in part, because they were not sure how much time would be needed with a physical therapist to teach Petitioner's caregivers the exercises and stretching they would need to do, nor how often the therapist would have to review and adjust the HEP. Community Care also did not appear to account for the cost of equipment or extra care givers that might be needed to implement an adequate HEP. While one would intuitively think that an HEP would be less costly than regular weekly visits to a physical therapist, the record does not make this entirely clear.

Second, with regard to whether Petitioner's outcomes can be met with an HEP, there is insufficient information in the record to support Family Care's contentions. Indeed, they have no, specific , proposed Home Exercise Plan, beyond extending the time allotted for PROM exercises from 15 minutes to 30 minutes a day. Ms. Baumle indicated that they have no specific HEP to propose, because Petitioner's physician has not provided a prescription. (It is unclear if this is because Petitioner's physician refused to provide such a prescription, or if it is because no one has asked the physician for the prescription.) As such, there is no way to compare Petitioner's current physical therapy with what is being proposed by Community Care. This is puzzling because Community Care's case comments seemed to indicate that they were going to put together a detailed plan, before proposing the transition to an HEP to Petitioner's mother/guardian. (See Exhibit 7, pgs. 82-100)

Third, with regard to the medical necessity of the current level of therapy, it is undisputed that Petitioner loses flexibility and becomes more difficult for his caregivers to dress and bathe, when he does not engage in physical therapy on a regular basis. Dr. Elizabeth Davis, Petitioner's physician, opined th at the current level of therapy is necessary to maintain Petitioner's flexibility and that given Petitioner's complicated medical condition, he is at risk of needing surgery to treat his contractures, if he does not receive sufficient physical therapy. Again, there is insufficient information in the record to determine whether the proposed HEP would provide sufficient therapy to maintain Petitioner's current level of flexibility and help him avoid surgery, which is, in general, costly.

It should be noted that the Wisconsin Administrative Code states that the CMO, through its case management team, shall monitor the health and <u>safety</u> of the enrollee**.** Wis. Admin. Code §DHS 10.44(2)(d)3, *emphasis added.*

It should also be noted that there was much discussion concerning how much Medicare would cover, as opposed to Community Care/Family Care and whether Medicare covered the desired services. Because Family Care is a subprogram of Wisconsin's Medicaid program, the applicable standards of coverage are those proscribed by the Medicaid program administered by the Wisconsin Department of Health Services,

not the standards of coverage proscribed by the Social Security Administration/Medicare. Wis. Adm. Code, §DHS 107.16(3)(c) provides for maintenance Physical Therapy in certain cases. Specifically, maintenance therapy is covered if one of three conditions is met:

1. The skills and training of a therapist are required to execute the entire preventive and maintenance program;
2. The specialized knowledge and judgment of a physical therapist are required to establish and monitor the therapy program, including the initial evaluation, the design of the program appropriate to the individual recipient, the instruction of nursing personnel, family, or recipient, and the necessary re-evaluations; or
3. When, due to the severity or complexity of the recipient's condition, nursing personnel cannot handle the recipient safely and effectively.

Community Care is correct that an updated home PROM regimen/HEP is needed, given the undisputed fact that Petitioner's parents and caregivers have not received any formal guidance in this area for over eight years and that it might help stave off the regression Petitioner experiences when he is unable to attend physical therapy. However, the record establishes that, at least for the time being, the specialized knowledge and judgment of a physical therapist are required to establish and monitor the maintenance therapy program.

As discussed above, it is undisputed that Petitioner needs a certain level of therapy to maintain his flexibility. One of the concerns expressed by Petitioner's parents and caregivers is knowing how far to push Petitioner, without injuring him or causing him undue pain. Because Petitioner is basically non-verbal and unable to communicate his wants and needs, he cannot tell a caregiver when they have gone too far or when he is in pain. Indeed, even Ms. Baumle, a trained therapist, conceded that Petitioner's non-verbal cues are difficult to ascertain. If this was difficult for Ms. Baumle, a trained professional to know, it is difficult to believe that a person untrained in picking up pain behaviors, or sensing muscle tension, would be able to adequately stretch Petitioner's muscles, as needed, without either being too timid or causing Petitioner undue pain.

Petitioner should note that Community Care was not unreasonable in questioning whether Petitioner could be transitioned into a HEP, given that he is in a maintenance phase of his therapy and that some of the tools the therapists use, such as a Swiss ball or wedges, can be purchased and used in the home. If Petitioner's current PROM is updated to a more comprehensive HEP and if Petitioner does not regress during absences from therapy due to illness or travel, there might be a basis upon which to conclude that Petitioner can safely and effectively be transitioned from skilled therapy, including aqua therapy, to a comprehensive HEP on a longer term basis in the future.

CONCLUSIONS OF LAW

Community Care has not met its burden to prove that it correctly reduced Petitioner's hours of "land" physical therapy and accompanying Caregiver hours, effective November 24, 2012.

THEREFORE, it is ORDERED

That Community Care reinstate, effective November 24, 2012, Petitioner's "land" physical therapy to two days per week and to reinstate the accompanying Caregiver hours to four hours per week. This shall be subject to review at the end of Petitioner's certification period. Community Care shall take steps to do this within ten days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 6th day of February, 2013.

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\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 6, 2013.

Community Care Inc.
Office of Family Care Expansion
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